1983

Blake Stevens Construction and Hartford Insurance v. Dwinn A. Henion, Mother of Bari Lyn Blair, Daughter of Barry A. Blair, Deceased, and the Industrial Commission Of Utah : Brief of Defendants

IN THE SUPREME COURT

OF THE STATE OF UTAH

BLAKE STEVENS CONSTRUCTION and HARTFORD INSURANCE, Plaintiffs, vs. DWINN A. HENION, Mother of BARI LYN BLAIR, daughter of BARRY A. BLAIR, deceased, and THE INDUSTRIAL COMMISSION OF UTAH, Defendants.	:	Case No. 19006

WRIT OF REVIEW FROM AN ORDER OF THE

INDUSTRIAL COMMISSION OF UTAH

BRIEF OF DEFENDANTS

Timothy C. Houpt
HOUPT & ECKERSLEY
510 Judge Building
Salt Lake City, Utah 84111
Telephone: (801) 532-0453

Henry K. Chai, II.
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
Post Office Box 3000
Salt Lake City, Utah 84110
Telephone: (801) 521-9000

IN THE SUPREME COURT

OF THE STATE OF UTAH

BLAKE STEVENS CONSTRUCTION and HARTFORD INSURANCE,	:	
Plaintiffs,	:	
vs.	:	
DWINN A. HENION, Mother of BARI LYN BLAIR, daughter of BARRY A. BLAIR, deceased, and THE INDUSTRIAL COMMISSION OF UTAH,	:	Case No. 19006
Defendants.	:	

WRIT OF REVIEW FROM AN ORDER OF THE

INDUSTRIAL COMMISSION OF UTAH

BRIEF OF DEFENDANTS

Timothy C. Houpt
HOUPT & ECKERSLEY
510 Judge Building
Salt Lake City, Utah 84111
Telephone: (801) 532-0453

Henry K. Chai, II.
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
Post Office Box 3000
Salt Lake City, Utah 84110
Telephone: (801) 521-9000

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

AUTHORITIES CITED

IN THE SUPREME COURT

OF THE STATE OF UTAH

BLAKE STEVENS CONSTRUCTION and HARTFORD INSURANCE,	:	
Plaintiffs,	:	
vs.	:	
	:	Case No. 19006
DWINN A. HENION, Mother of BARI LYN BLAIR, daughter of BARRY A. BLAIR, deceased, and THE INDUSTRIAL COMMISSION OF UTAH,	:	
Defendants.	:	

BRIEF OF DEFENDANTS

NATURE OF THE CASE

A petition was filed by Blake Stevens Construction Company and Hartford Insurance Company, defendants below, for a review of the finding of the Industrial Commission of the average weekly wage of Barry A. Blair who died as a result of an accident in the course of his employment for Blake Stevens Construction Company.

DISPOSITION BY THE INDUSTRIAL COMMISSION

After a hearing on the denial by the plaintiffs of liability for death benefits to the afterborn daughter of the deceased, Administrative Law Judge Timothy C. Allen found that the decedent's average weekly wage at the time of his death was [illegible]00 per week and that his daughter was entitled to benefits

based upon those earnings. The plaintiffs filed a Motion for [illegible] contesting the inclusion in the calcuation of the deceased's average weekly wage of amounts paid to him for living expenses. The Industrial Commission affirmed Judge Allen's finding in a unanimous decision.

RELIEF SOUGHT ON APPEAL

The defendant requests that the court affirm the Industrial Commission's order.

STATEMENT OF FACTS

The defendant accepts as accurate the plaintiffs' summory of the facts with the additional statement that the evidence upon which the Commission based its findings both as to the paternity of the minor applicant and the earnings of the deceased was uncontracted in every respect. (R27-47).

POINT I

THE INDUSTRIAL COMMISSION IS AUTHORIZED BY LAW TO INCLUDE PAYMENTS TO A WORKER FOR LIVING EXPENSES IN ITS CALCULATION OF HIS AVERAGE WEEKLY WAGE.

The Supreme Court, in reviewing acts of the Industrial Commission, is limited to a determination of whether the Commiss has exceeded its powers or disregarded some positive provision of law in making or denying an award. Utah Consol. Mining Co. v. Industrial Commission, 66 Utah 173, 240 Pac. 440 (1925).

The issue raised by this petition is whether the Indust Commission was authorized to consider evidence of payments to the deceased by his employer for living expenses as well as

payments for his hourly wage in making its finding of his average weekly wage" within the meaning of the Compensation Act.

Section 35-1-75 Utah Code Ann. (Replacement Volume 4B 1981 Pocket Supplement) provides the basis for computing a worker's average weekly wage which, in turn, determines the rate at which workmen's compensation benefits are payable to his dependents in the event of his death by industrial accident.

> 35-1-75. Average weekly wage - Basis of computation. (1) Except as otherwise provided in this act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute the weekly compensation rate and shall be determined as follows:
>
> (a) If at the time of the injury the wages are fixed by the year, the average weekly wage shall be that yearly wage divided by 52.
>
> (b) If at the time of the injury the wages are fixed by the month, the average weekly wage shall be that monthly wage divided by 4 1/3.
>
> (c) If at the time of the injury the wages are fixed by the week, that amount shall be the average weekly wage.
>
> (d) If at the time of the injury the wages are fixed by the date, the weekly wage shall be determined by multiplying the daily wage by the number of days and fraction of days in the week during which the employee under a contract of hire was working at the time of the accident, or would have worked if the accident had not intervened. In no case shall the daily wage be multiplied by less than three for the purpose of determining the weekly wage.
>
> (e) If at the time of the injury the wages are fixed by the hour, the average weekly wage shall be determined by multiplying the hourly rate

by the number of hours the employee would have worked for the week if the accident had not intervened. In no case shall the hourly wage be multiplied by less than 20 for the purpose of determining the weekly wage.

(f) If at the time of the injury the hourly wage has not been fixed or cannot be ascertained, the wage for the purpose of calculating compensation shall be the usual wage for similar services where those services are rendered by paid employees.

(g)(1) If at the time of the injury the wages are fixed by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen the wages, not including overtime or premium pay, of the employee earned through that employer in the first, second, third, or fourth period of thirteen consecutive calendar weeks in the 52 weeks immediately preceding the injury.

(2) If the employee has been employed by that employer less than thirteen calendar weeks immediately preceding the injury, his average weekly wage shall be computed as under subsection (1)(g)(1), presuming the wages, not including overtime or premium pay, to be the amount he would have earned had he been so employed for the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees, in a similar occupation.

(3) If none of the methods in subsection (1) will fairly determine the average weekly wage in a particular case, the commission shall use such other method as will, based on the facts presented, fairly determine the employee's average weekly wage.

(4) When the average weekly wage of the injur employee at the time of the injury is determined as in this section provided, it shall be taken as the basis upon which to compute the weekly compensation rate. After the weekly compensatio has been computed, it shall be rounded to the nearest dollar.

This Court has recently construed Section 75 of the [illegible] Act with particular reference to the authority conferred upon the Commission by subsection (3). In Craig Burnham Produce v. Industrial Commission, Utah Sup.Ct. No. 17968 (January 24, 1983) the employer sought reversal of an award by the Commission which was based upon a calculation of his employee's average weekly wage which included his earnings from a separate part-time job. The plaintiffs argued that Section 75 of the act conferred no express authority upon the Commission to combine earnings from two employers and that the Commission was therefore limited in its authority to multiplying the employee's hourly wage in his employment at the moment of injury by the number of hours he worked on that job in accordance with subsection (e).

This Court rejected the employer's narrow construction of the Industrial Commission's statutory authority. Justice Hall explained that the Legislature intended by subsection (3) to give the Commission broad authority to use "methods over and above those specified in subsection (1) as will permit it to fairly determine the injured employee's weekly wage". Burnham v. Industrial Commission, supra. The Court's analysis of the question in Burnham suggests that the Industrial Commission's determination of what is fair will not be disturbed unless its method of computation is contrary to the express provisions of the statute or unless the result is incompatible with the underlying purpose of the Workmen's Compensation Act.

A. THE COMMISSION'S FINDING IS NOT IN CONFLICT WITH ANY SPECIFIC PROVISION OF THE COMPENSATION ACT.

The plaintiffs argue that the Commission's considerati of subsistence payments in making its average weekly wage findin is inconsistent with Utah law because a specific provision allow such payments to be regarded as wages which is part of a model compensation act is not found in the Utah act and because the definition of the word "wages" in the Wage Claim Act, Utah Code Anno. Sec. 34-28-2(2)(Replacement Volume 4B 1974), et seq. does not expressly include payments for living expenses.

A related argument was made by the employer in Burnham v. Industrial Commission, supra, as noted, and was rejected by this Court. Unless there is an express prohibition on the manner of calculation employed, the question is simply whether the Commission could lawfully employ such a method under subsection (3).

Furthermore, there is nothing in the legislative histor of Section 75 which remotly implies, as plaintiffs suggest, that the Utah Legislature intended to exclude living expenses from the statutory definition of wages in the Compensation Act. The plaintiffs state that Section 75 of the Utah act is "modeled after" Section 19 of the proposed "Workmen's Compensation and Rehabilitation Law" drafted by the Council on State Governments. That provision is set forth along with the Section 75 in Append "A". However, a comparison of the two reveals more differences

from similarities.

First, it is obvious that the model act provides a much more detailed scheme for calculating the average weekly wage than does the Utah statute with specific provisions applicable to minors, apprentices, volunteer firemen, seasonal workers and persons with dual employment. Secondly, it contains no provision comparable to Section 75(3) vesting authority in the Commission to use wage calculation methods which are not specifically enumerated.

Furthermore, the wage definition which plaintiffs contend our Legislature deliberately omitted from the Utah act is not found in Section 19 of the model act but is one of twenty-five definitions in Section 2 of the suggested legislation. The definition section of the Utah Compensation Act, Utah Code Ann., Section 35-1-44, (Replacement Volume 4B, 1974), contains only eight definitions and bears no relationship to the model act. Significantly, the Utah act at Section 44(8) defines "average weekly earnings" simply as "the average weekly earnings arrived at by the rules provided in Section 35-1-75".

If any conclusion about the Legislature's intention is justified by a comparison of the two acts, it is that our Legislature disavowed any attempt to address all the situations in which the wage determination might involve peculiar considerations in favor of a broad grant of discretion to the Industrial Commission to formulate calculation methods consistent with the purpose of the act.

It is also noteworthy that the model act in Section 1[illegible] contains a specific provision requiring that wages from two [illegible] be combined which is, of course, absent from the Utah act. The plaintiffs'view that the omission from the Utah act of a manditory calculation provision in the model act reflects a legislative intent to prohibit the Commission from employing such a method would foreclose the result reached by this Court in Burnham.

Plaintiffs next contend that the definition of the term "wages" in Sec. 34-28-2(2) Utah Code Ann. (Replacement Volume 4B 1974) which applies to the Wage Claims Act substantiates their position that payments for living expenses are not wages. In pertinent part, that section states that

> The word "wages"means all amounts due the employee for labor or services . . .

Given our Legislature's specific provision that "wages" in the Compensation Act are to be calculated and defined by the formula set out in Section 75, it seems minimally useful to examine definitions of the term found elsewhere in the code which are expressly limited in their application to other chapters. The defendants submit, however, that the definition of wages relied on, "amounts due . . . for labor or services . . ." does not exclude payments for living expenses. If an employer agreed to pay an employee a specific amount for living expenses in return for his labor and services and then refused to do so, the defen[illegible]

suggest that these unpaid amounts would indeed qualify as "wages" within the meaning of the Wage Claims Act and that an action to recover them would lie.

The Industrial Commission is not prohibited from including living expenses in its calculation of a worker's average weekly wage nor is there any indication that the Legislature intended that such earnings not be considered.

B. THE INCLUSION OF LIVING EXPENSES IN AVERAGE WEEKLY WAGE CALCULATIONS IS A REASONABLE EXERCISE OF DISCRETION BY THE COMMISSION IN KEEPING WITH THE PURPOSE OF THE ACT.

If more than one inference or conclusion can reasonably be drawn from the evidence, it is not the Supreme Court's perogative to direct which one the Commission should chose. Pace v. Industrial Commission, 87 Utah 6, 47 P.2d 1050 (1935). Similarly, when this Court is reviewing an exercise by the Commission of discretion committed to it by the Legislature to adopt the wage calculation method it deems fairest in a particular case, the Supreme Court is not called upon to substitute its judgment for that of the Commission but simply to decide whether the Commission abused its discretion, e.g., Probst v. Industrial Commission, 588 P.2d 717 (Utah 1978).

It is the nearly unanimous rule in other jurisdictions that payments made to an employee by his employer for living expenses in the form of free room or board, or fixed amounts to pay for those costs, when they are understood by the parties to constitute part of the consideration given for an employee's

services, are to be included in the calculation of his wages for compensation purposes, 2A Larson The Law of Workmen's Compensation, Sec. 60.12; 82 Am Jur. 2d. "Workmen's Compensation" Sec. 372.

The plaintiffs correctly note that the legislatures of many states have expressly provided that the value of board, rent, housing, etc. when given to a worker by his employer are part of his wages, Jess Parrish Memorial Hospital v. Ansill, 390 So. 2d. 1201 (Fla. App. 1980); Waldroupe v. Kelly, 189 Kan.99, 367 P.2d 77(1961); H.J. Heinz Co. v. Wood, 181 Okl. 389,74 P.2d 353 (1937); Parrish v. Industrial Commission, 15 Colo. 2d. 538, 379 P.2d 384 (1963), but they contended that because the question has so often been resolved legislatively, reference to the law of other jurisdictions does not aid the Court in this review. However the prevalance of statutes resolving this issue in the same manner as did the Commission, the body which under our law was given the discretion to do so, actually reflects the reasonableness of its determination.

Furthermore, it is the general rule in jurisdictions without such express provisions to include living expenses or the value of room and board in claulcation of average wages. For example, the Supreme Court of Arizona in Matlock v. Industrial Commission, 70 Ariz. 25, 215 P.2d 612 (1950) held that the actual value of housing and food provided to a ranch hand should be added to his salary to compute is average wage. The courts of Louisiana have long held that when an employer provides lodging or meals to

employer or a sum to pay for them their value should be calculated as part of his average wages. Morgan v. Equitable General Insurance Co., 383 So. 2d 1067 (La. App. 1980), Ardven v. Southern Farm Bureau Casualty Ins. Co., 134 So. 2d 323 (La. App. 1961); also, Bannister v. Shepherd, 191 S.C. 165, 4 S.E. 2d 7 (1939).

The plaintiffs make much of the fact that the employer in this case paid the deceased's living expenses when he was required to work out of town but not when he was able to live at home and argue that such a case should be distinguished from one where an employer provides or pays for lodging or meals throughout the year. Assuming that it is within the Industrial Commission's power to include payments for living expenses in the average wage calculation, however, there is no basis in logic nor in the policy of the law for requiring it to make such a distinction.

In states which have adopted a rule that payments for living expenses are part of a worker's wages, those payments are typically included even if they are only made when a person is away from his home eating in restaurants and lodging in hotels as in Cosgriff v. Duluth Firemen's Relief Ass'n., 233 Minn. 233, 46 N.W. 2d 250 (1951) and American Surety of New York v. Underwood, 4 S.W. 2d 551 (Tex. Civ. App. 1934). The latter case involved a travelling salesman who was reimbursed for out of pocket expenses for food and hotels while on the road even though he lived at home otherwise.

Similarly, in applying a New York compensation statu which based compensation payments on a proven diminution of income, a New York appellate court concluded that a travelling salesman who sustained an injury which prevented him from trave and obtaining subsistence payments in addition to his salary had suffered a wage loss even though he continued to receive his salary since he would no longer have the cost of his food and housing borne by his employer. Rowe v. Kenney, 7 NYS 2d 768 (N.Y. 3rd App.Div. 1938).

This application of the rule makes sense. Payment of out of state living expenses is not simply reimbursement to a worker for out of pocket expenses occasioned by his job but constitutes an increase in his earnings during that time. Such a worker spends money for food whether he is at home or out of town. If at home, he pays for his food out of his hourly wages When on the road, however, an additional payment is made to him with which to cover the same expense.

It is true that the cost of a motel room might represen an expense incurred solely because of his job in the case of a person who continues to pay rent or to discharge a mortgage o a house from which he is absent. However, in the general sense the cost of housing, like the cost of food, is one which, witho payment of living expenses, a worker must provide for out of hi hourly wages but which with an additional payment he may cover reduce so as to create an increase of his earnings. As the Tex

Texas Court observed in The American Surety Co., case, supra, 74 S.W. 2d at 553,

> Whether an employee maintains his own home or not he must nevertheless have a place to sleep and food to eat, and some pecuniary advantage must ordinarily result to him in having these necessities supplied by his employer.

Furthermore, there is no evidence in this case that the employer's payment of a subsistence allowance was contingent upon an actual outlays of money by the deceased for living expenses. Presumably, if he chose to sleep in a tent and bring his own food he would have been equally entitled to the additional sum as a bonus for out of town work. Additionally, the plaintiffs' suggestion that the subsistence payment was intended in part to cover "travel expenses", Brief of Plaintiffs, P.6, is without foundation in the record. There is no evidence that the deceased spent money for gasoline or any other cost of transportation which was to be reimbursed by the subsistence payment.

In sum, there in nothing about the nature of the payment of living expenses to a worker who is out of town which makes it unreasonable to treat those payments like other extra payments for provision of living expenses in return for work.

The plaintiffs' contention that the Commission's application of Section 75 of the Act is inconsistent with the purpose of the Workmen's Compensation Act is equally without merit. The purpose of the act, in the words of this court, is

> to substitute a more humanitarian and economical system of compensation for injured workmen or their dependents in case of death which the more humane and moral conception of our time requires . . .

Barker Asphalt Corp. v. Industrial Commission, 103 Utah 371, 135 P.2d 266, 270 (1943), and to

> alleviate hardships upon workers and their dependents due to industrial injuries.

Spencer v. Industrial Commission, 4 Utah 2d 185, 29 P.2d 689, 694 (1955). Again and again this court has held that the act should be liberally construed to afford coverage and give effect its purposes. Burnham, supra, at P.15, Spencer v. Industrial Commission, supra.

The plaintiffs contend that if living expenses are included in the calculation of wages upon which compensation to the dependent of the deceased employee is based, she will receive a "windfall". Their argument is that if the deceased were alive the cost of his own food and housing would consume the payment for living expenses and that it would not represent any increase in funds available for the care of a dependent. Once he is dead, it would be an unfair benefit to his surviving dependent to allow her to collect compensation based upon payments intended to cover those expenses.

The suggestion that the Commission's award was a "windfall" to a child who will never see her father is rather incredible. In any event, it is the defendant's view, as noted earlier, that the payment for living expenses is not simply reimbursement for out

[illegible] expenses occasioned solely by employment but is a bonus payment for food and housing which increases the total earnings available for other purposes including the care of dependents. Moreover, the plaintiffs' argument could be made in any death case. Whenever the wage earner dies all of his "living expenses" are eliminated. Nevertheless, the Legislature has determined that his dependents should have benefits in the amount of two-thirds of his average weekly wages, as defined pursuant to Section 75, up to fixed maximum without requiring any deduction from his wages for those expenses which will no longer be incured or directing any inquiry towards what portion of his average weekly wage the deceased actually had available for the care of his dependents during his life.

The purpose of the act is effectuated when it is liberally construed to afford coverage and to reduce the economic consequences to his family of a worker's death by industrial accident.

CONCLUSION

Rather than attempting to anticipate the many factual variations which might arise in calculating a worker's average weekly wage, our Legislature in Section 75 set forth several basic mathematical formulas which would resolve the issue in most cases and then gave the Industrial Commission authority to use any other method which would more fairly resolve the issue. By deciding that payments made to an employee for living expenses should be considered along with his hourly wages in determining his average

weekly wage, the Commission has reached the same result as have every court and legislature which has addressed the issue. Its consideration of those earnings in this case is a reasonable exercise of its discretion and is consistent with the humanitarian purpose of the act and the liberal construction this Court has always given it.

This Court's jurisdiction on review is limited. Where substantial evidence supports the Commission's findings and it has not abused the discretion conferred upon it by law, the Commission's order should be affirmed.

DATED this 5th day of May, 1983.

Timothy C. Houpt
Attorney for Defendants

APPENDIX "A"

Workmen's Compensation and Rehabilitation Law Section 19	Utah Code Annotated Section 35-1-75 (Replacement Vol.4B, 1981 Pocket Supplement)
Section 19. (Determination of Average Weekly Wage). Except as otherwise provided in this act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:	35-1-75. Average weekly wage-Basis of computation. (1) Except as otherwise provided in this act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute the weekly compensation rate and shall be determined as follows:
(a) If at the time of the injury the wages are fixed by the week the average weekly wage should be that amount;	(a) If at the time of the injury the wages are fixed by the year, the average weekly wage shall be that yearly wage divided by 52.
(b) If at the time of the injury the wages are fixed by the month, the average weekly wage shall be the monthly wage so fixed multiplied by 12 and divided by 52;	(b) If at the time of the injury the wages are fixed by the month, the average weekly wage shall be that monthly wage divided by 4 1/3.
(c) If at the time of the injury the wages are fixed by the year, the average weekly wage shall be the yearly wage so fixed divided by 52;	(c) If at the time of the injury the wages are fixed by the week, that amount shall be the average weekly wage.
(d)(I) If at the time of the injury the wages are fixed by the day, hour or the output of the employee, the average weekly wage shall be the wage most favorable to the employee	(d) If at the time of the injury the wages are fixed by the date, the weekly wage shall be determined by multiplying the daily wage by the number of days and fraction of days in the week during which the employee under a contract of hire was working at the time of the accident, or would have worked if the accident had not intervened. In no case

computed by dividing by 13 the wages (not including overtime or premium pay) of said employee earned in the employ of the employer in the first, second, third, or fourth period of 13 consecutive calendar weeks in the 52 weeks immediately preceeding the injury.

(2) If the employee has been in the employ of the employer less than 13 calendar weeks immediately preceeding the injury, his average weekly wage shall be computed under the foregoing paragraph, taking the wages (not including overtime or premium pay) for such purposes to be the amount he would have earned had he been so employed by the employer the full 13 calandar weeks immediately preceeding the injury and had worked, when work was available to other employees in a similar occupation.

(e) If at the time of the injury the hourly wage has not been fixed or can not be assertained, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where such services are rendered by paid employees.

(f) In occupations which are exclusively seasonal and therefore cannot be carried on throughout the year, the average weekly wage shall be taken to be one-fiftieth of the total wages which the employee has earned from all occupations during the 12

shall the daily wage be multiplied by less than fi for the purpose of determi the weekly wage.

(e) If at the time of th injury the wages are fixed the hour, the average week wage shall be determined b multiplying the hourly rate by the number of hours the employee would have worked the week if the accident ha not intervened. In no case shall the hourly wage be multiplied by less than 20 the purpose of determining weekly wage.

(f) If at the time of the injury the hourly wage has been fixed or cannot be ascertained, the wage for the purpose of calculating compensation shall be the usual wage for similar services where those services are re dered by paid employees.

(g)(1) If at the time of the injury the wages are fi by the output of the employe the average weekly wage sha be the wage most favorable the employee computed by di ing by thirteen the wages, including overtime or premi pay, of the employee earne through that employer in th first, second, third, or fourth period of thirteen consecutive calendar weeks the 52 weeks immediately preceeding the injury.

(2) If the employee ha employed by that employer than thirteen calendar wee immediately preceding the his average weekly wage sh

...ths immediately ...ceding the injury.

(g) In the case of volunteer firemen, police, and civil defense members or trainees, the income benefits shall be based on the average weekly wage in their regular employment.

(h) If the employee was a minor, apprentice or trainee when injured, and it is established that under normal conditions his wages should be expected to increase during the period of disability, that fact may be considered in computing his average weekly wage.

(i) When the employee is working under concurrent contracts with two or more employers and the defendant employer has knowledge of such employment prior to the injury, his wages from all such employers shall be considered as if earned from the employer liable for compensation.

be computed as under subsection (1)(g)(1), presuming the wages, not including overtime or premium pay, to the amount he would have earned had he been so employed for the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees, in a similar occupation.

(3) If none of the methods in subsection (1) will fairly determine the average weekly wage in a particular case, the commission shall use such other method as will, based on the facts presented, fairly determine the employee's average weekly wage

(4) When the average weekly wage of the injured employee at the time of the injury is determined as in this section provided, it shall be taken as the basis upon which to compute the weekly compensation rate. After the weekly compensation has been computed, it shall be rounded to the nearest dollar.

CERTIFICATE OF SERVICE

I certify that I have served two copies of this Brief on Henry K. Chai, II of SNOW, CHRISTENSEN & MARTINEAU, 10 Exchange Place, 11th Floor, Post Office Box 3000, Salt Lake City, Utah, 84110, by placing in pre-addressed envelopes and depositing them in the United States Mail, first class postage prepaid.

HOUPT & ECKERSLEY